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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Shasta)

THE PEOPLE, Plaintiff and Respondent, v. DONALD DALE ZAMORA, Defendant and Appellant.	C064253 (Super. Ct. No. 09F6117)

Defendant Donald Dale Zamora was convicted of attempted kidnapping of a child under the age of 14, attempted kidnapping of a child for the purpose of committing a lewd and lascivious act, making criminal threats, indecent exposure, and annoying or molesting a child. There were also findings that he served a prior prison term and had a prior serious felony conviction. The trial court sentenced defendant to 24 years in prison.

On appeal, defendant contends (1) the trial court abused its discretion in denying his request to represent himself,

(2) the trial court abused its discretion in ordering that he be shackled during trial, and (3) defendant received ineffective assistance of counsel because his attorney failed to sufficiently cross-examine and impeach the main witness against him.

We conclude:

(1) The trial court did not abuse its discretion in denying defendant's request for self-representation. Defendant was repeatedly disruptive and manifested an inability or unwillingness to comply with courtroom procedure.

(2) Defendant did not meet his burden to show that the evidence was inadequate to support a finding of manifest need for shackling. The available information indicates that the trial court did not abuse its discretion, and there is no evidence of prejudice.

(3) Defendant does not establish ineffective assistance of counsel. Defense counsel's tactical choices were not deficient.

We will affirm the judgment.

BACKGROUND

On August 25, 2009, 15-year-old D.R. was walking with his three-year-old sister J.R. in their apartment complex. D.R. saw defendant at the top of some stairs and saw his friend Kyler on the walkway in front of the apartments. D.R. had never seen defendant before.

As D.R. and J.R. went up the stairs to see Kyler, defendant blocked their way, yelling, "Do you want to get your ass whooped, little boy." D.R. was frightened, and turned and

walked down the stairs with J.R. Defendant yelled after J.R., "Hey, pretty little girl. How old are you? What's your name?" D.R. looked back up at defendant and saw that his penis was exposed.

D.R. and J.R. walked across the parking lot to Kyler's apartment to tell Kyler's father about what happened, but he was not home. Then they walked back through the carport in the middle of the U-shaped complex to go to their apartment to tell their own parents. Defendant was sitting in a truck with the door open. He got out at some point and the next thing D.R. knew, defendant grabbed J.R. away from him. Defendant dragged J.R. toward his truck parked a few feet away. He got her into the truck and tried to shut the door, but D.R. hit defendant until he let J.R. go.

J.R. ran home crying and told her mother that D.R. was fighting a man. The man had grabbed J.R. and pushed her face down into his privates. J.R. was hysterical and clung to her mother. A group of people from the apartment complex held defendant in his truck until the police came. While defendant sat in the truck, his pants were undone and his penis was exposed.

Defendant denied seeing D.R. and J.R. on the stairs, denied speaking to J.R., denied exposing himself, and denied grabbing J.R. and attempting to molest her. Defendant stated, "[T]here is no way that I would molest a child. I grew up in a wealthy family. We had 54 babies." Defendant maintained that when he rented the apartment the day before the incident, D.R. tried to

get him to buy drugs for D.R. and tried to charge him $10 to see the apartment. That same night, defendant had to go to the hospital due to severe constipation. Two nurses became angry when he passed gas in front of them and they called the police. The police abused him and then dropped him off in a vacant lot.

While walking home, defendant soiled his pants. He washed them out in his apartment but had nothing to wear. He stuck his head out the window and asked if anyone had clothes for him. A black woman gave him some unisex pants. Defendant testified, "[T]hat got me dressed to go -- and to go make this deal that I had on a million dollar project. I'm not kidding."

Defendant was working on his truck when he was surrounded by a crowd of people. Someone thought he had harmed the three-year-old girl. He was not scared because he had worked at three prisons with hardcore inmates, and had been to 28 countries on four continents over a two-year period.

Corporal Eric Niver of the Redding Police Department responded to the scene. Defendant's zipper was undone and he had on female underwear. Niver testified that defendant said the underwear belonged to his girlfriend, but defendant yelled out in court that this was a lie. Niver stated that defendant admitted speaking to the three-year-old girl and telling her she was pretty. Defendant did not tell Niver about going to the hospital, being beaten by police in a vacant lot, soiling his clothes, and getting clothes from a black woman. Defendant did not tell Niver about D.R.'s alleged attempt to get defendant to

buy drugs for him or charging him $10 to see the apartment. Defendant told Niver he did not know the girl or her brother.

A jury convicted defendant of attempted kidnapping of a child under the age of 14 (Pen. Code, §§ 208, subd. (b), 664);[1] attempted kidnapping of a child for the purpose of committing a lewd and lascivious act (§§ 209, subd. (b), 288, 664); making criminal threats (§ 422); indecent exposure (§ 314, subd. 1); and annoying or molesting a child (§ 647.6, subd. (a)). The jury also found that defendant had served a prior prison term (§ 667.5, subd. (b)); had been convicted previously of a serious felony (§ 667, subd. (a)(1)); and had been convicted of a serious felony within the meaning of section 1170.12. The trial court sentenced defendant to 24 years in state prison.[2]

DISCUSSION

I

Defendant contends the trial court erred in denying his request to represent himself pursuant to *Faretta v. California* (1975) 422 U.S. 806, 819 [45 L.Ed.2d 562] (*Faretta*).

In *Faretta,* the United States Supreme Court declared that a defendant "must be free personally to decide whether in his

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[1] Undesignated statutory references are to the Penal Code.

[2] Defendant is not entitled to an increase in presentence conduct credit because he was convicted of serious felonies. (§§ 208, 209, 422, 664, 1192.7, subd. (c)(20),(38), (39), 4019 [as amended by Stats. 2009, 3d Ex. Sess. 2009–2010, ch. 28, § 50], former 2933, subd. (e)(3) [as amended by Stats. 2010, ch. 426, § 1, eff. Sept. 28, 2010].)

particular case counsel is to his advantage," even though "he may conduct his own defense ultimately to his own detriment . . . ." (*Faretta, supra,* 422 U.S. at p. 834 [45 L.Ed.2d at p 581].) Thus, a state may not "constitutionally hale a person into its criminal courts and there force a lawyer upon him, even when he insists that he wants to conduct his own defense." (*Id.* at p. 807 [45 L.Ed.2d at p. 566].) "The right to self-representation is unconditional when a defendant makes a reasonably timely request (whereas an untimely request is subject to the trial court's discretion based on prescribed factors)." (*People v. Watts* (2009) 173 Cal.App.4th 621, 629 (*Watts*).)

Defendant initially made a *Faretta* request in early December 2009, but when questioned by the trial court defendant said he wanted a *Marsden* hearing (*People v. Marsden* (1970) 2 Cal.3d 118), which the trial court held immediately. The trial court denied the request for new counsel. On December 28, 2009, the day before trial, counsel again mentioned that defendant had made a *Faretta* request. Defendant was still in the holding area at the time but was loud enough to be heard in the courtroom. Judge Anderson commented that defendant had been making loud, hostile noise from the holding area, and that the judge could still hear the commotion when the door was closed. Judge Anderson said he had expressed concern for the court's safety but had been assured by the bailiff that extra staff was present to deal with defendant.

After defendant was brought into the courtroom, Judge Anderson asked him about the commotion in the holding area. Defendant responded, "Right now? Oh, I'm putting this guy out. Oh, boy, this guy is fit to be tied. Oh, that's right. He's up in a -- hey, I don't like judges. Right off the bat, I guess, you want to send me out, Anderson. I guess, that is who you are. Oh, sure, Anderson." Judge Anderson asked defendant what he wanted the court to do and defendant replied, "Can you tell me? I can't remember. Oh, I want, I guess, I would like another attorney or act as my own attorney. The judge is real too cool and an asshole or butthole. That is not -- that is coming out wrong." The trial judge tried to interrupt by saying defendant's name, but defendant continued to talk, adding "You talking to me? You can call me Mr. Zamora. My dad is dead." The trial judge said defendant's behavior was disruptive. Defendant asked, "Who you talking to?" When the trial judge indicated that he was talking to defendant, defendant responded, "Then why are you looking at these guys?"

The trial judge decided to have defendant removed from the courtroom, saying "The court cannot get a word in edgewise." Defendant responded, "Take it easy, everyone. You have all been so nice. Especially you, you asshole, fucking idiot, Judge Anderson." The trial court denied defendant's *Faretta* request because "his conduct was so disruptive. He wouldn't allow the court to talk. I had to remove him so that we could conduct court proceedings and in some kind of orderly fashion. So I'm

ruling his self-representation [request] is denied because of his disruptive behavior."

Faretta warned that a trial court "may terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct." (*Faretta*, *supra*, 422 U.S. at pp. 834-835, fn. 46 [45 L.Ed.2d at p. 581].) According to the California Supreme Court, "the same rule applies to the denial of a motion for self-representation in the first instance when a defendant's conduct prior to the *Faretta* motion gives the trial court a reasonable basis for believing that his self-representation will create disruption." (*People v. Welch* (1999) 20 Cal.4th 701, 734 (*Welch*); *Watts, supra,* 173 Cal.App.4th at pp. 629-630.)

"'The right of self-representation is not a license to abuse the dignity of the courtroom. Neither is it a license not to comply with relevant rules of procedural and substantive law.' [Citation.] . . . '[A]n accused has a Sixth Amendment right to conduct his own defense, provided only that he knowingly and intelligently forgoes his right to counsel and that he is able and willing to abide by rules of procedure and courtroom protocol.' [Citation.] This rule is obviously critical to the viable functioning of the courtroom. A constantly disruptive defendant who represents himself, and who therefore cannot be removed from the trial proceedings as a sanction against disruption, would have the capacity to bring his trial to a standstill." (*Welch, supra*, 20 Cal.4th at p. 734, italics omitted.)

"Thus, a trial court must undertake the task of deciding whether a defendant is and will remain so disruptive, obstreperous, disobedient, disrespectful or obstructionist in his or her actions or words as to preclude the exercise of the right to self-representation." (*Welch, supra*, 20 Cal.4th at p. 735.) The extent of a defendant's disruptive behavior may not be fully evident from the cold record and the trial court is in the best position to judge the defendant's demeanor. (*Ibid*.) Accordingly, we defer to the trial court's exercise of discretion absent a strong showing of clear abuse. (*Ibid*.)

Here, defendant created a disruption in the holding area which could be heard in the courtroom, repeatedly interrupted the trial court, and shouted obscenities at the judge. Under the circumstances, the trial court did not abuse its discretion in denying the *Faretta* motion because defendant "manifested an inability to conform his conduct to procedural rules and courtroom protocol." (*Watts, supra,* 173 Cal.App.4th at p. 630; see also *People v. Howze* (2001) 85 Cal.App.4th 1380, 1397 [no abuse of discretion in denial of *Faretta* motion where defendant was obstreperous and created a risk of disrupting the proceedings].)

Defendant argues the trial court erred by not granting the *Faretta* motion and appointing standby counsel in case defendant became disruptive at trial. He asserts the United States Supreme Court indicated this is the proper method to handle the potential for obstructionist conduct by a defendant acting as his own attorney.

Defendant takes the comments made by the Supreme Court out of context. In a footnote in *Faretta*, the Supreme Court rejected the generic concern that criminal defendants representing themselves might use the courtroom for deliberate disruption of their trials, observing that the right of self-representation had "been recognized from our beginnings" and yet "no such result has thereby occurred." (*Faretta*, *supra*, 422 U.S. at p. 834, fn. 46 [45 L.Ed.2d at p. 581, fn. 46].) If a defendant deliberately engaged in obstructionist misconduct, the trial judge could terminate self-representation. (*Ibid.*) And, "a State may . . . appoint a 'standby counsel' to aid the accused if and when the accused requests help, and to be available to represent the accused in the event that termination of the defendant's self-representation is necessary." (*Ibid.*)

Nothing in *Faretta* suggests, however, that a state *must* appoint standby counsel, rather than denying a motion for self-representation, where a defendant has already been disruptive and already demonstrated an inability or unwillingness to comply with courtroom procedure and protocol. "It would be a nonsensical and needless waste of scarce judicial resources to [grant the *Faretta* request and] proceed to trial when, as here, defendant has shown by his conduct during pretrial proceedings that he is unable to conform to procedural rules and protocol." (*Watts, supra,* 173 Cal.App.4th at p. 630.)

Citing *People v. Windham* (1977) 19 Cal.3d 121, 128-129 (*Windham*), defendant asserts that the trial court abused its discretion by denying his *Faretta* request without developing a

meaningful record for appellate review. But *Windham* is inapposite. The factors enumerated there pertain to a midtrial request for self-representation. (*Id.* at p. 128.) The factors pertain more to the timing of the request and do not address defendant's disruptive behavior or his inability or unwillingness to conform his conduct to procedural rules and courtroom protocol.

Under the circumstances, defendant fails to establish that the trial court abused its discretion in denying his *Faretta* request.

II

Defendant also contends that the trial court abused its discretion in ordering that he wear shackles during trial.

We review the trial court's decision to impose restraints for an abuse of discretion. (*People v. Mar* (2002) 28 Cal.4th 1201, 1217 (*Mar*).) A defendant cannot be physically restrained in the jury's presence absent a showing of a manifest need for the restraints. (*People v. Hill* (1998) 17 Cal.4th 800, 841.) Manifest need may arise from "a showing of unruliness, an announced intention to escape, or '[e]vidence of any nonconforming conduct or planned nonconforming conduct which disrupts or would disrupt the judicial process if unrestrained . . . .' [Citation.]" (*People v. Cox* (1991) 53 Cal.3d 618, 651, disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) The conduct which supports a showing of manifest need must appear as a matter of

record. (*People v. Vance* (2006) 141 Cal.App.4th 1104, 1112 (*Vance*).)

A defendant's behavior outside of the courtroom may justify use of restraints within the courtroom. (*People v. Price* (1991) 1 Cal.4th 324, 402-404.) While a record of violent crime cannot alone justify a decision to permit shackles, the court may consider evidence of violent or nonconforming conduct while in custody. (*People v. Hawkins* (1995) 10 Cal.4th 920, 944, disapproved on another point in *People v. Lasko* (2000) 23 Cal.4th 101, 107, 110.) "[W]hen the imposition of restraints is to be based upon conduct of the defendant that occurred outside the presence of the court, sufficient evidence of that conduct must be presented on the record so that the court may make its own determination of the nature and seriousness of the conduct and whether there is a manifest need for such restraints; the court may not simply rely upon the judgment of law enforcement or court security officers or the unsubstantiated comments of others." (*Mar, supra,* 28 Cal.4th at p. 1221.)

"A trial court abuses its discretion if it abdicates this decisionmaking responsibility to security personnel or law enforcement." (*People v. Hill, supra,* 17 Cal.4th at p. 841.) "The record must demonstrate that the trial court independently determined on the basis of an on-the-record showing of defendant's nonconforming conduct that 'there existed a manifest need to place defendant in restraints.' [Citation.]" (*Mar, supra*, 28 Cal.4th at p. 1218.)

On the first day of trial, defense counsel objected to the fact that defendant's hands and feet were shackled to a waist chain because this would lead the jury to believe that defendant was dangerous. Judge Halpin did not say that he was aware of defendant's unruly behavior at the prior pretrial proceedings before Judge Ruggiero or Judge Anderson, but this is a reasonable inference given that the trial court stated it "had the Marshals bring over the jail file on this defendant . . . ." The trial court marked the file as court's exhibit No. 1 and observed it contained "voluminous information about problems that they've had with [defendant] with respect to his custody status."

After defense counsel "reviewed a small portion of th[e] file," he did not object to the use of restraints, he only objected to the type of restraint. Defense counsel argued that less visible restraints should be used such as a "bandit," which is an electric shock device worn on the calf under clothing. It delivers a 50,000 volt shock after it is activated remotely by the bailiff.

The trial court asked Deputy Sampson, who prepared the restraint assessment file and recommended the type of restraint, why she believed shackles were appropriate. Deputy Sampson stated that other devices would not sufficiently confine defendant to a level necessary to protect the court, jurors, counsel and security staff. With the bandit, when a defendant makes an aggressive move and the bailiff presses the remote button to activate it, there is a warning delay. When the

bandit was tested on Deputy Sampson, she was able to remain standing and take a step. Waist and leg chains limit mobility and the ability to strike out and injure others.

Deputy Sampson acknowledged that the bandit could be activated before defendant walked ten feet, and she was not aware of any physical aggression by defendant toward defense counsel, only verbal hostility. Defense counsel argued that because he was the only person within five or ten feet of defendant, a bandit would suffice to protect others in the courtroom. Defense counsel asked that if the trial court disagreed, the jury be given a limiting instruction regarding defendant's shackles.

The trial court ruled that defendant be restrained with waist chains and leg irons, but it was willing to change its ruling if it became apparent that restraints were not necessary. The trial court instructed the jury -- prior to voir dire, during pre-trial instructions, and after the close of evidence -- that it must disregard and should not be influenced by the fact defendant was in physical restraints. The trial court also advised the jurors to disregard any outbursts he might make because the issue was whether he committed the charged crimes, not whether he was outlandish.[3]

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[3] During trial, defendant called the judge a "fucking idiot," an "asshole," a "fucking liar" and a "lying sack of shit;" called the bailiff a "cunt," which defendant claimed was an acronym for "Cannot Understand Normal Thinking;" and told the prosecutor he wanted to "fucking knock you in your goddam [*sic*] fucking mouth and in the nose." Among other things, the jury heard defendant

Defendant contends the trial court abused its discretion in ordering that he wear shackles when his conduct did not demonstrate a potential for violence or a risk of escape. He maintains that verbal outbursts do not justify imposing restraints, that the trial court abdicated its discretion regarding whether to restrain defendant, and it failed to make the requisite showing on the record that restraints were required. Defendant also contends that even if restraints were justified, the trial court should have used less obtrusive means.

Defendant does not support his claim that the trial court failed to make a sufficient showing on the record, because he did not include his jail file, court's exhibit No. 1, in the appellate record. Although "[t]he burden is on the People to establish in the record the manifest need for the shackling" (*Vance, supra,* 141 Cal.App.4th at p. 1112), this refers to the burden in the trial court. On appeal, the appellant must provide an adequate record to support his or her claim of prejudicial error or the error is forfeited. (*Ballard v. Uribe* (1986) 41 Cal.3d 564, 574-575; *People v. Malabag* (1997) 51 Cal.App.4th 1419, 1427; *People v. Clifton* (1969) 270 Cal.App.2d 860, 862.) The trial court relied on defendant's jail file in ruling that shackles were necessary, and defendant cannot undermine this ruling by failing to include the exhibit in

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tell the judge, "Shut up. Don't talk to me, you bastard," and "You're a goddam [*sic*] fucking idiot."

the appellate record and then asserting that the record is insufficient.

We could deem the matter forfeited given defendant's failure to provide an adequate record on appeal. Instead, we agree with the People that it is reasonable to infer that information in the probation report about defendant's in-custody behavior was similar to that contained in his jail file. Defendant had been a problem for jail staff. He refused to take medications for his bipolar disorder and was irritable, belligerent, aggressive and confrontational. The jail staff had to move defendant "off the pods on four occasions for vandalism and destruction of property, five times for 'gassing,' and nine times for major rule violations." He was disciplined for disrespecting staff, not following orders, assaulting an officer, attempting to assault an officer, and threatening staff.

There is also ample evidence of defendant's tendency to disrupt the courtroom. He hurled epithets and profanities at three different judges during three pretrial proceedings.[4] While his behavior was primarily verbal, it was highly disruptive, causing the trial court to remove him from the courtroom on one

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[4] At the November 3, 2009 preliminary hearing, defendant interjected, "It's all bullshit. God damn it" and told Judge Curle, "I think you're a fucking idiot you God damn judge." On December 9, 2009, after Judge Ruggiero told defendant to be quiet, defendant responded, "Why don't you fucking shove it up your fucking ass." Defendant's behavior at the *Faretta* hearing before Judge Anderson is discussed above in part I of the opinion.

occasion. There is no minimum ratio of disruptive to acceptable behavior before a trial court may restrain a disruptive defendant, and defendant's pretrial outbursts were too frequent and too severe for the trial court to ignore.

Nor did the trial court abdicate its discretion to security personnel; it simply relied on Deputy Sampson's expertise regarding how the various methods of restraint worked before making its own decision based on her testimony and its review of defendant's jail file.[5]

In any event, defendant was not prejudiced by the shackling. Error in the use of restraints is harmless if there is no evidence the jury was aware that a defendant was shackled or only briefly observed the restraints, and there is no evidence that the shackles impaired or prejudiced the defendant's right to testify or participate in his or her defense. (*People v. Cunningham* (2001) 25 Cal.4th 926, 988–989; *People v. Anderson* (2001) 25 Cal.4th 543, 596; *People v. Tuilaepa* (1992) 4 Cal.4th 569, 583–584.)

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[5] At one point the trial court stated: "Well, I'm going to go ahead and proceed with the restraints on. The Court has a duty to make sure that everybody is safe. He also has a duty to make sure the defendant gets a fair trial. And it's difficult to overrule the people that are responsible for safety. [¶] With all due respect to you, [defense counsel], and with due respect to myself, we don't know that much about it. So I am going to go ahead." Although it is possible to construe this comment as deference to Deputy Sampson's judgment, the complete record shows that the trial court reviewed defendant's jail file, brought in Deputy Sampson to testify about the matter, and made its own decision.

Defendant's leg restraints were visible briefly when the jury entered the courtroom, but there is no clear indication that the jurors' observation of the restraints occurred at other times. Defendant does not allege that his ability to communicate with his lawyer or participate in his own defense was adversely affected by the shackles. When defendant testified, he stood and raised his right hand to be sworn in, indicating he was not shackled during his testimony.

The record does not establish that defendant's shackles "shocked [the jury] or affected their assessment of the evidence." (*People v. Tuilaepa, supra,* 4 Cal.4th at p. 585.) If anything, the jury was more likely to be shocked by defendant's crude and disruptive outbursts. Moreover, the evidence against defendant was strong and straightforward, contradicted only by defendant's rambling and, at times, nonsensical testimony. We are convinced beyond a reasonable doubt that the jury would have returned the same verdict had defendant not been shackled. (*Deck v. Missouri* (2005) 544 U.S. 622, 635 [161 L.Ed.2d 953, 966].)

III

Defendant further contends that he received ineffective assistance of counsel based on his trial counsel's abbreviated cross-examination of D.R. and failure to impeach D.R. concerning discrepancies between his trial testimony and his statements to one of the responding police officers.

The defendant bears the burden of proving ineffective assistance of counsel and, to succeed on such a claim, must

establish both deficient performance and resulting prejudice. (*People v. Maury* (2003) 30 Cal.4th 342, 389.) "A court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. [Citation.] Tactical errors are generally not deemed reversible, and counsel's decisionmaking must be evaluated in the context of the available facts. [Citation.]" (*Ibid.*) Generally, cross-examination and impeachment are matters of trial tactics and strategy. (*Gustave v. United States* (9th Cir. 1980) 627 F.2d 901, 905.)

"To the extent the record on appeal fails to disclose why counsel acted or failed to act in the manner challenged, we will affirm the judgment unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation. [Citation.] Moreover, prejudice must be affirmatively proved; the record must demonstrate 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' [Citation.]" (*People v. Maury, supra,* 30 Cal.4th at p. 389.)

Defendant points out that at the preliminary hearing, Sergeant Bullington said D.R. told him that D.R., Kyler, and J.R. were together on the second floor when defendant confronted them. However, D.R. testified at trial that he and J.R. were on the stairs and Kyler was above them on the walkway in front of the apartments when the confrontation occurred. Sergeant

Bullington also testified that D.R. said defendant approached him and J.R. in the parking lot, that defendant's penis was exposed when he grabbed J.R., and that defendant pulled her toward the pickup truck which was less than 50 feet away. At trial, however, D.R. said defendant was inside the truck when he grabbed J.R. and D.R. did not see if defendant's penis was exposed. Defendant asserts that trial counsel "should have been salivating waiting to impeach [D.R.]," but he barely cross-examined him.

Defense counsel's decision not to extensively cross-examine D.R. was a rational tactical choice. The disparity between D.R.'s statements to Bullington and his trial testimony was not so great that D.R. could not have provided a logical explanation. D.R. consistently stated that defendant threatened him and his sister at the apartment complex, that defendant exposed himself, and that defendant called out to J.R. as they were leaving. At trial D.R. said that Kyler and defendant were on the first floor above the carport while he and J.R. were on the stairs. But because the first floor of apartments was above the carport, it is possible that Sergeant Bullington referred to the first floor above the carport as the second floor, and indicated that they all were on the first floor when, in fact, D.R. and J.R. were trying to join Kyler on the first floor. It is also possible that D.R. did not give Bullington a precise statement during the excitement following defendant's attempted kidnap of D.R.'s three-year-old sister. Cross-examining D.R. regarding this minor discrepancy was not likely to tarnish his

credibility and establish a reasonable doubt in the minds of the jurors given that D.R. consistently testified concerning the primary facts.

As for the attempted kidnapping in the parking lot, D.R. testified defendant got out of the truck and dragged J.R. a few feet into the truck, which does not necessarily conflict with the officer's testimony that defendant dragged J.R. to his truck less than 50 feet away. Moreover, there is no clear indication whether Bullington was estimating the distance when he testified or whether D.R. told the officer the truck was less than 50 feet away.

Defendant seizes on the alleged disparity between D.R.'s statement and testimony regarding whether or not defendant's penis was exposed when he grabbed J.R., but fails to explain how it would have been helpful to cross-examine D.R. on this matter. Bullington testified that D.R. said defendant's penis was exposed. D.R. testified he did not see if his penis was exposed "[b]ut my sister says it was." The prosecutor admonished D.R. to only talk about what he saw. If defense counsel had cross-examined D.R. about the alleged discrepancy, D.R. would be able to explain and emphasize that the police statement was based upon what his sister stated that she saw. Not only would the witness be rehabilitated, the damaging fact would be emphasized. Thus, trial counsel was not deficient for declining to follow up on this point.

Defendant has not established that he received ineffective assistance of counsel.

DISPOSITION

The judgment is affirmed.

MAURO, J.

We concur:

RAYE, P. J.

NICHOLSON, J.